RECENT CASE NOTES

ADMIRALTY—JURISDICTION—NON-MARITIME TORTS—IN REM ACTION IN STATE COURT FOR INJURY TO OBJECT ON SHORE.—While employed as a stevedore by the defendant vessel and while working on the wharf, the plaintiff was injured by a sling-load of cement that was being lowered from the ship. He brought a tort action in the state court against the vessel by name, in accordance with the Oregon "Boat Lien Law." Or. Laws, 1920, sec. 10281 *et seq.* It was objected that the state court had no jurisdiction in an action *in rem* against a foreign vessel. *Held,* that the court had jurisdiction. *Cordrey v. The Bee* (1921, Or.) 201 Pac. 202.

The power of the federal courts is limited to that granted by the Constitution, in which it is provided, that "The judicial Power shall extend . . . . to all Cases of admiralty and maritime Jurisdiction." Art. 3, sec. 2. It is well established that, in contract matters, admiralty jurisdiction depends upon the nature of the transaction, and in tort matters, upon the locality. *Grant Smith-Porter Ship Co. v. Rhode* (1922) 42 Sup. Ct. 157; see p. 561, *infra.* In the instant case, therefore, admiralty could have no jurisdiction over the tort as such. *Keator v. Rock Plaster Mfg. Co.* (1919, S. D. N. Y.) 256 Fed. 574; *The Bee* (1914, D. Or.) 216 Fed. 709. But a stevedore performs a maritime service, giving the plaintiff a contract claim in admiralty, a point which the two preceding cases seem to have overlooked. *Atlantic Transport Co. v. ImBrovek* (1914) 234 U. S. 52, 34 Sup. Ct. 733. The claim, however, is limited to maintenance and cure, and an indemnity only if the injury were caused by a defective appliance; and it cannot be enlarged by state laws. *Chelentis v. Luckenbach* (1918) 247 U. S. 372, 38 Sup. Ct. 501. Workmen's Compensation statutes create contract rights and are not available. *So. Pacific Co. v. Jensen* (1917) 244 U. S. 205, 37 Sup. Ct. 524; see COMMENTS (1917) 27 YALE LAW JOURNAL, 255; (1920) 29 YALE LAW JOURNAL, 925. And where this is the sole remedy of the employee under the state law, a stevedore injured on shore has no claim in tort. *Keator v. Rock Plaster Mfg. Co.* (1918) 224 N. Y. 540, 120 N. E. 56; certiorari denied in *State Industrial Commission v. Rock Plaster Mfg. Co.* (1918) 248 U. S. 574, 39 Sup. Ct. 12. Although the claim is within the admiralty jurisdiction, a state court may maintain an action *in personam* with an attachment of the ship as security. *Knapp, Stout & Co. v. McCaffrey* (1900) 177 U. S. 638, 20 Sup. Ct. 824. But it cannot maintain an action *in rem* if admiralty has jurisdiction. *The Glide* (1897) 167 U. S. 606, 17 Sup. Ct. 930. And the Oregon statute is void in so far as it authorizes the Oregon courts to do so. *Aurora Shipping Co. v. Boyce* (1911, C. C. A. 9th) 191 Fed. 960. But this necessarily cannot apply when the cause of action is not cognizable in admiralty. See *Johnson v. Chicago & P. Elevator Co.* (1886) 119 U. S. 388, 397, 7 Sup. Ct. 254, 258. And even an action *in rem* in the state court should be permitted. See *Knapp, Stout & Co. v. McCaffrey, supra,* at p. 647, 20 Sup. Ct. at p. 828. Until Congress has legislated, the state may protect its citizens, the incidental interference with commerce being immaterial. *Pennsylvania Ry. v. Hughes* (1903) 191 U. S. 477, 488, 24 Sup. Ct. 132, 135; see COMMENTS (1921) 30 YALE LAW JOURNAL, 732. In the instant case, however, there are two possible viewpoints. The plaintiff's claim in contract and his claim in tort may be considered as wholly distinct and separate, so that the admiralty jurisdiction in contract does not prevent a state from having jurisdiction *in rem* over the tort. But it seems more in line with the federal policy of uniformity in the maritime law to consider the tort and contract claims as differing remedies arising from the same cause, which is thus within the admiralty jurisdiction.

BILLS AND NOTES—ALTERATION OF PAYEE'S NAME ON DRAFT BEFORE CERTIFICATION—INABILITY OF DRAWEE TO RECOVER PAYMENT MADE TO HOLDER.—The plaintiff bank certified a draft and paid its amount to the defendant bank, a holder in due course. The plaintiff later discovered that the draft had been stolen and altered, by changing the name of the payee, before it had been presented to the plaintiff for certification. The plaintiff sued to recover from the defendant. *Held*, that the plaintiff could not recover. *National City Bank v. National Bank of the Republic* (1921) 300 Ill. 103, 132 N. E. 832.

Prior to the Negotiable Instruments Law it was settled that an acceptor warranted the genuineness of the drawer's signature but not the other parts of a bill. Hence when the signature of the drawer was genuine but the amount of the bill was altered before it was accepted, the acceptor could recover from the holder of the bill. *White v. Continental Nat. Bank* (1876) 64 N. Y. 316. Section 62 of the N. I. L. provides that an acceptor of an instrument "engages that he will pay according to the tenor of his acceptance; and admits . . . . the existence of the payee and his then capacity to indorse." This section has been interpreted to mean that the acceptor "must pay to the innocent payee or subsequent holder the amount called for by the bill at the time he accepted, even though larger than the original amount ordered by the drawer." And that *"a fortiori* a drawee who pays a raised bill or check, without acceptance or certification, should not recover the money paid from an innocent holder." Ames, *The Negotiable Instruments Law* (1900) 14 HARV. L. REV. 241, 243. It would seem from the wording of the N. I. L. and Dean Ames' interpretation, which has never been challenged, that a change was intended in the common law. But if so, the courts certainly have not recognized it. *Continental Nat. Bank v. Tradesman's Nat. Bank* (1899) 36 App. Div. 112, 55 N. Y. Supp. 545; *New York Produce Exchange Bank v. Twelfth Ward Bank* (1909, Sup. Ct.) 62 Misc. 69, 119 N. Y. Supp. 988; *McClendon v. Bank of Advance* (1915) 188 Mo. App. 417, 174 S. W. 203; *Interstate Trust Co. v. United States Nat. Bank* (1919) 67 Colo. 6, 185 Pac. 260. The theory on which these cases rest is that the acceptor paid the money by mistake and that the holder warranted the genuineness of every part of the bill except the signature of the drawer. To require the acceptor to warrant the tenor of the bill as it was when presented to him would seriously retard business. It is impossible for him to determine from the face of the instrument whether it has been altered. He would require a personal confirmation by the drawer of the tenor of every draft. It is the holder, who has trusted the fraudulent person, that should bear the loss. It is unreasonable for him to have acted in reliance on the acceptance. Further, it may very well be that the N. I. L. was intended to mean that the acceptor engages to pay only according to the *original* tenor of the instrument and admits the existence of the *original* payee only. The instant case, however, follows Dean Ames' interpretation, thereby establishing a new conflict on the N. I. L. In view of the fact that the purpose of the N. I. L. was primarily to codify and unify the existing law, it is submitted that the decision is wrong and anomalous. It may be of some comfort to the supporters of Dean Ames that his conclusion is at least in line with the law of England and the Continental countries. *Langton v. Lazarus* (1839, Exch.) 5 M. & W. 628; 1 Pardessus, *Cours de Droit Commercial* (6th ed. 1856) 545.

CONFLICT OF LAWS—DIVORCE DECREE OBTAINED IN FOREIGN STATE THROUGH FRAUD—PROSECUTION FOR BIGAMY.—The accused and his wife were domiciled in Virginia, where they separated. He later obtained a divorce, without personal service or appearance of his wife, in West Virginia, testifying that his wife had abandoned him and that more than one year had elapsed since the separation. The accused then married a second wife and returned to Virginia, where he was

convicted of bigamy. *Held,* that the West Virginia divorce decree would not be recognized, the conviction for bigamy being sustained. *Corvin v. Commonwealth* (1921, Va.) 108 S. E. 651.

Where one spouse has obtained a domicil in a state other than that of the rightful matrimonial domicil, and has obtained a divorce without personal service or appearance of the other spouse, the court of the matrimonial domicil need not recognize the divorce under the full faith and credit clause of the federal constitution. *Haddock v. Haddock* (1906) 201 U. S. 562, 26 Sup. Ct. 525; but see Goodrich, *Matrimonial Domicil* (1917) 27 YALE LAW JOURNAL, 49. The courts, however, are disposed to recognize the decree on the grounds of comity, but there is authority to the contrary. *Joyner v. Joyner* (1908) 131 Ga. 217, 62 S. E. 182; *Duncan v. Duncan* (1920) 265 Pa. 464, 109 Atl. 220. If the spouse who obtained the divorce had induced the court to take jurisdiction by fraudulent representations, the decree will not be recognized in another state because of the lack of jurisdiction of the court granting the divorce. *Wagoner v. Wagoner* (1921, Mo.) 229 S. W. 1064; but see *Hicks v. Hicks* (1912) 69 Wash. 627, 125 Pac. 945. In the instant case, however, the fraud was not such as affect the jurisdiction of the court, and it would be an anomaly to permit a decree to be attacked collaterally for perjury in the trial itself. From statements in some cases it seems as though this exception may be created in divorce cases, although the point has never been squarely decided. See *Succession of Benton* (1901) 106 La. 494, 31 So. 123; 59 L. R. A. 135, 186, note; but see *Deyette v. Deyette* (1918) 92 Vt. 305, 104 Atl. 232 (suit brought by third party). Since the courts are therefore not required to recognize a decree of divorce based on service by publication, they may specify under what conditions they will recognize it. It seems, however, that only strong reasons of public policy should induce a court to refuse to give effect to a decree, as in the instant case, on the grounds of perjury at the trial.

CONTRACTS—IMPOSSIBILITY OF PERFORMANCE BY THE PLAINTIFF OF A CONDITION PRECEDENT TO THE DUTY OF THE DEFENDANT.—The plaintiff was employed by the township trustee to teach in the county school for a six-month term. The health board, acting under statutory authority, ordered the trustee to close the school in view of an influenza epidemic. *Burns Ann. Sts.* 1914, sec. 7608. The plaintiff sued the trustee for payment for the period during which she had not been able to teach. *Held,* that the trustee was under no duty to pay. *Gregg School v. Hinshaw* (1921, Ind.) 132 N. E. 586.

The recent tendency in similar cases has been to evade the real problem by finding either that the defendant has waived the condition of performance by the plaintiff, or that the defendant has impliedly ordered the teacher to hold himself in readiness to perform during the period of suspension, and thus not only waived the original condition but received a substituted performance of equal value. *Board of Education v. Couch* (1917) 63 Okla. 65, 162 Pac. 485; *Montgomery v. Board of Education* (1921, Ohio) 131 N. E. 497. Such a solution, however, is unsatisfactory, since, in the majority of cases, there is no foreknowledge of the duration of the closing, and such a request may always be implied from the mere form of the notice. See *Montgomery v. Board, supra.* And even those cases which imply the request from the temporary nature of the closing, seem to hold, somewhat inconsistently, that if at *any* time afterward, the closing becomes permanent, such a request will not be inferred. *Randolph v. Sanders* (1899) 22 Tex. Civ. App. 331, 54 S. W. 621; *Board v. Couch, supra.* Other courts hold that the performance of the teaching service, the condition precedent to the duty of the defendant to pay, has been made impossible, apparently by the defendant's act in closing the school, and that such prevention by the defendant nullifies the condition. *Dewey v. School District* (1880) 43 Mich. 480; *School District v. Gardner*

(1920) 142 Ark. 557, 219 S. W. 11; *Crane v. School District* (1920) 95Or. 644, 188 Pac. 712. It seems strange, however, that courts have not taken the necessary step further and recognized that the same things which excuse the plaintiff from the performance of *his* duty, should excuse the defendant when he makes it impossible for the plaintiff to perform a condition precedent to the *defendant's* duty. For example, if the influenza epidemic had reached such proportions that the teacher's life would be endangered if he continued to teach, there is little doubt that he would be excused from his promised performance, and that the defendant would be excused from payment, since the latter had not received the expected consideration. *Lakeman v. Pollard* (1857) 43 Me. 463. Thus if the plaintiff's promised performance was the attendance of babies at a baby show, if the prevalence of an epidemic made such attendance dangerous to the lives of the babies, the plaintiff would be excused from performance and the defendant from payment. *Hanford v. Conn. Fair* (1918) 92 Conn. 621, 103 Atl. 838. If the plaintiff has the privilege to refuse performance if his or a third person's life is endangered, and thereby can destroy the *defendant's* rights under the contract as well as his own, there seems to be no reason why the defendant under the same circumstances should not have the privilege to keep the plaintiff from performing the condition precedent to the defendant's duty, and thereby destroy the *plaintiff's* rights under the contract, as well as his own. Tested by this reasoning, even without such statutory sanction as in the principal case, the defendant should be excused. *Sandry v. Brooklyn School District* (1921, N. D.) 182 N. W. 689; 3 Williston, *Contracts* (1920) sec. 1958.

COPYRIGHT—COMMON-LAW COPYRIGHT—PRODUCER'S RIGHTS IN CREATION.—The defendant, composer of the "Wicked Blues," sold all his rights therein to the plaintiff. Subsequently the defendant with others copyrighted the song as the "Crazy Blues" and published it. The plaintiff sought an injunction. *Held,* that the defendant by his sale to the plaintiff parted with his common-law rights in the production and that an injunction should issue. *Kortlander v. Bradford* (1921, Sup. Ct.) 116 Misc. 664, 190 N. Y. Supp. 311.

Until publication a producer has at common law full property rights in his intellectual creations. *Parton v. Prang* (1872, C. C. D. Mass.) 3 Cliff. 537; *Bobbs-Merrill Co. v. Straus* (1906, C. C. A. 2d) 147 Fed. 15; Morgan, *Law of Literature* (1875) 392. What constitutes a publication is often difficult to determine. "A publication consists in such a disclosure, exhibition, or distribution as implies an abandonment of the right of copyright or its dedication to the public. . . . . The nature of the subject-matter . . . . and the nature of the rights secured, are chiefly determinative of the question of publication." *Werckmeister v. American Lithographic Co.* (1904, C. C. A. 2d) 134 Fed. 321, 326. It was originally held that even after publication or dedication to the public the exclusive right to the control of reproduction remained with the producer, his representatives, or assigns. *Millar v. Taylor* (1769, K. B.) 4 Burr. 2303. But it is now everywhere well-settled that a producer's common-law rights in an unpublished work cease upon publication. *Donaldsons v. Beckett* (1774, H. L.) 4 Burr. 2408; *Wheaton v. Peters* (1834, U. S.) 8 Pet. 591. See Drone, *Copyright* (1879) 13. The right to the control of reproduction after publication is now purely statutory. *Caliga v. Inter Ocean Newspaper Co.* (1909) 215 U. S. 182, 30 Sup. Ct. 38. Having full property rights prior to publication, an author can deal with his production as with any other personalty. *Maurel v. Smith* (1921, C. C. A. 2d) 271 Fed. 211. He may dispose of the physical object solely and retain the right to make copies or to obtain a copyright. *Parton v. Prang, supra; Stephens v. Cady* (1852, U. S.) 14 How. 528. He may otherwise make a restricted disposal of it as by selling the right to reproduce in certain countries only. *Daly v. Walrath*

(1899) 40 App. Div. 220, 57 N. Y. Supp. 1125. In the present case, the producer before publication, by an unrestricted disposal, chose to divest himself of all rights in his production. Consequently a subsequent assignee, whether taking with or without notice, could not interfere with the first assignee's right to the exclusive use of the property. See *Harms v. Stern* (1915, C. C. A. 2d) 229 Fed. 42.

DAMAGES—BREACH OF CONTRACT—REMOTENESS OF LOSS.—The defendant's agent, upon receipt of $502.44 from the plaintiff's agent, promised to telegraph the sum of $500 to Baltimore and there pay that amount to such person as the defendant believed to be the plaintiff without requiring positive evidence of identity, the plaintiff's agent at the time of sending the message signing a waiver of identification. The defendant refused to deliver to the plaintiff at Baltimore without positive identification, whereby the plaintiff, because unable to deposit promptly $500 for certain horses which he had purchased and resold, lost $7,500. *Held,* that the plaintiff could recover only nominal damages. *Taggart v. W. U. Tel. Co.* (1921) 198 App. Div. 366, 190 N. Y. Supp. 450.

If loss of profits resulting from a breach of contract can be measured with reasonable certainty, and if such loss results not too remotely from the breach, damages therefor may be recovered. *Nelson v. Davenport* (1919) 108 Wash. 259, 183 Pac. 132; *Tompkins v. Bridgeport* (1920) 94 Conn. 659, 110 Atl. 183. If a promisor actually knows the kind of benefits his promisee reasonably expects from performance of the contract, and if the benefits anticipated are not inherently speculative, then the loss of those benefits as a result of the promisor's breach is usually held not remote. *Czizek v. W. U. Tel. Co.* (1921, C. C. A. 9th) 272 Fed. 223; *Miles v. Am. Ry. Exp. Co.* (1921, Ark.) 233 S. W. 930; *W. U. Tel. Co. v. Johnson* (1921, Tex.) 226 S. W. 671; *Shurtleff v. Occidental Bldg. & Loan Assoc.* (1921, Neb.) 181 N. W. 374. Conversely, if the benefits are not within the reasonable contemplation of the promisor, the promisee upon breach cannot recover damages for their loss. *Hadley v. Baxendale* (1854) 9 Exch. 341; *Hines v. Denny* (1921) 190 Ky. 416, 227 S. W. 567. And, as the instant case holds, this is true even though the amount of the loss can be measured with certainty. A statement in the body of a telegram, if reasonably clear to the telegraph company, may put the company upon such notice of the kind of benefits expected by the sender, as to justify his recovery of damages arising from their loss in case of failure to transmit and deliver the message properly. *Dettis v. W. U. Tel. Co.* (1919) 141 Minn. 361, 170 N. W. 334. But here, too, if the anticipated benefits are not measurable with reasonable certainty there can be no recovery for their loss. *Harris v. W. U. Tel. Co.* (1918) 136 Ark. 63, 206 S. W. 52. The instant case seems in accord with the best authority.

FORCE MAJEURE—IMPOSSIBILITY OF PERFORMANCE AS A DEFENCE.—A statute imposed a duty on the appellants to pay a penalty for failing to supply electricity to applicants. In a suit by the respondent for the penalty, the appellants set up the defence of *force majeure* which the statute allowed. They proved that performance was prevented by the refusal of their union employees to connect their main with respondent's wiring, which had been installed by a non-union contractor. The trial court found a "grave probability" of a strike which would plunge the whole community into darkness, if the recalcitrant employees were dismissed. *Held,* that this apprehension of danger was not *force majeure. Hackney Borough Council v. Dore* (1921, K. B.) 38 T. L. R. 93.

Recent English cases reveal a tendency of attorneys in drafting contracts to secure elasticity in the clause excusing non-performance by employing the term *"force majeure."* It is admirable for their purpose for as yet the courts are reluctant to give it a definition. Although the term *"force majeure"* is of French

orgin, little aid can be derived from the French law in the process of fixing its meaning, for great difference of opinion exists both among the French writers and the French courts as to its significance and application. Dalloz, *Nouveau Code Civil* (1901-5) art. 1148, sec. 1 *et seq.;* Biermann, *Die Höhere Gewalt im Französischen Recht* (1895) 10 *Archiv für Bürgerliches Recht,* 46. The same uncertainty exists in the continental law respecting the term *vis major.* Lorenzen, *Moratory Legislation* (1919) 28 YALE LAW JOURNAL, 380 (Appendix C. Vis Major). Doubtless, however, the eventual meaning of *force majeure* will include "Act of God." *The Boucau* [1909] P. 163; see (1922) 31 YALE LAW JOURNAL, 440. With reference to other causes the result is indeed problematical and will be reached slowly by a process of exclusion and inclusion, at present greatly influenced by the possibility of the defendant foreseeing the impediment to his future performance. Thus delay due to cessation of work on account of normal bad weather, a football game, or a funeral, or due to a deviation of a ship running short of coal, is not caused by *force majeure. Matsoukis v. Priestman & Co.* [1915] 1 K. B. 681; *Yrazu v. Astral Shipping Co.* (1904, K. B.) 9 Com. Cas. 100. Nor is a default resulting from a defect in tin used in canning by the defendant's vendor. *Libeaupin v. Crispin* [1920] 2 K. B. 714. But non-performance on the day designated arising from the indirect effect of a general coal strike and from the breaking down of machinery was excused under the doctrine. *Matsoukis v. Priestman & Co., supra.* Perhaps war is *force majeure.* See *Zinc Corporation v. Hirsch* [1916, C. A.] 1 K. B. 541, 554. In the instant case the court reluctantly refused to construe a threatening strike as *force majeure* excusing the non-performance of a statutory duty. If an actual strike had been called, an opposite conclusion would have been probable. *Murphy Hardware Co. v. So. Ry.* (1909) 150 N. C. 703, 64 S. E. 873. So elastic is the term that it would seem to have been better social engineering for the English court to have weighed the grave likelihood of detriment to the whole community with the respondent's inconvenience and to have allowed the appellants to have protected the many to the neglect of the one.

HOMESTEAD—JOINDER OF HUSBAND AND WIFE IN DEED OF MORTGAGE—ESTOPPEL OF HUSBAND TO DENY VALIDITY OF DEED.—The plaintiff, fraudulently representing himself to be unmarried, gave to the defendant a mortgage deed to his homestead which he knew to be invalid, fully aware that the defendant accepted it in good faith. This action was brought by the husband and wife to set aside the mortgage as void. The wife died after the commencement of the action, the ownership of the property remaining unchanged. *Held,* that the plaintiff was estopped to deny the validity of the mortgage. *Bozich v. First State Bank of Buhl* (1921, Minn.) 184 N. W. 1021.

A deed purporting to convey land to which the "grantor" has no title is invalid. If title subsequently vests in the grantor, he is estopped to deny its validity. Coke, *Littleton,** 47b; 2 Tiffany, *Real Property* (1920 ed.) sec. 545. Similarly, in cases involving homestead rights, the husband may have title to the land, but he has not the sole power of conveyance. When this power subsequently vests in him, he should be estopped to deny the validity of his former deed (as an exercise of such power). The general rule is that a deed or mortgage purporting to convey a homestead, executed by a married man, is inoperative unless his wife joins in the conveyance. *Robison v. Robison* (1919) 187 Iowa, 1209, 175 N. W. 9; *Ferrell v. Wood* (1921, Ark.) 232 S. W. 577. Although the homestead rights, which are given by statute only, may be lost by abandonment, it has been held that a mortgage deed executed by one spouse only and therefore invalid will not be validated by a subsequent abandonment. *Shannon v. Potter* (1921, Okla.) 200 Pac. 860. If either spouse joins the other in signing a deed under duress or

while mentally unbalanced, it is invalid even when the grantee purchases without knowledge of these facts. *Hayden v. Latch* (1921, Iowa) 182 N. W. 868. So also the husband is not estopped when his lessee knew that the wife was insane. *Peterson v. Skidmore* (1921, Kan.) 195 Pac. 600. However, if a new homestead is acquired, the husband is estopped to deny the validity of a deed executed by him alone on the former homestead. *Fisher v. Gulf Protection Co.* (1921, Tex. Civ. App.) 231 S. W. 450. Upon examination it will be found that the cases which seem to hold that the deed, being invalid, cannot operate as an estoppel against either the husband or the wife, are in fact based upon the ground that there was no proof of fraud exercised upon the grantee, rather than upon the alleged rule that "neither husband nor wife can be estopped from asserting the homestead right as against a grant or mortgage not executed in the mode prescribed by law." 13 R. C. L. 663; 15 Cyc. 686; see *Clark v. Bird* (1909) 158 Ala. 278, 48 So. 359; *Gillam v. Wright* (1910) 246 Ill. 398, 92 N. E. 906; *Ekblaw v. Nelson* (1914) 124 Minn. 335, 144 N. W. 1094. (In regard to an action for breach of contract to convey a homestead, see 4 A. L. R. 1272, note.) It can hardly be questioned that an estoppel could not have been set up against the joint interest of the husband if the wife had remained alive. In view of his fraudulent manifestations, however, the court seems to have reached a very just result.

INSURANCE—EXPRESS WARRANTY AS TO HEALTH—GOOD FAITH OF APPLICANT.—In an action upon a life insurance policy wherein the insured expressly warranted the truth of the statements set out in the application, questions as to whether the insured had consulted a doctor within five years or had ever had pleurisy were incorrectly answered in the negative. *Held,* that as the facts did not show that the insured knew or should have known the nature of his affliction when examined, the warranty was not broken and the beneficiary could recover. Cothran, J., *dissenting. Sligh v. Soverign Camp* (1921, S. C.) 109 S. E. 279.

By the great weight of authority, the incorrectness in fact of warranties as to bodily health will entirely avoid the policy, the good faith of the applicant being immaterial. *National Annuity Association v. McCall* (1912) 103 Ark. 201, 146 S. W. 125; *Layton v. New York Life Ins. Co.* (1921, Calif. App.) 202 Pac. 958; 15 L. R. A. (N. S.) 1277, note. The decision in the instant case, however, may be noted as an extreme example of a tendency of some courts to avoid so strict an interpretation of "express warranty clauses" and to adopt the view that the applicant warrants only the honesty and good faith of his opinion as to his bodily condition. This is more just to the policy-holder who can otherwise never be sure of the validity of his contract. *Moulor v. American Life Ins. Co.* (1884) 111 U. S. 335, 4 Sup. Ct. 466; see *Rasicot v. Royal Neighbors of America* (1910) 18 Idaho, 85, 98, 108 Pac. 1048, 1052. In many states it has been necessary to resort to legislation to avoid the orthodox construction of warranty clauses. Such statutes practically abolish the effect of warranties as to health. See 2 Cooley, *Briefs on Insurance* (1905) pars. 1189-1195. They are constitutional. *Hancock Mutual Life Ins. Co. v. Warren* (1901) 181 U. S. 73, 21 Sup. Ct. 535. One statute has gone so far as to provide that the issuance of a certificate of health by the appointed medical examiner estops the insurer from asserting that the applicant was not in the state of health required by the policy. Iowa Ann. Code, 1897, sec. 1812. It is difficult to perceive how the instant court could have construed a warranty that the insured had not consulted a doctor within five years to have been made in good faith, when the evidence showed a hospital operation within such time. See 18 L. R. A. (N. S.) 362, note. Moreover, both of these contested warranties were obviously material to the contract. A construction reducing the effect of an immaterial warranty to that of a representation should be met with approval, but where the warranty is both material and false, there can be no

equity in charging an insurer who has been so induced to assume the risk. See *Blenke v. Citizen's Life Ins. Co.* (1911) 145 Ky. 332, 342, 140 S. W. 561, 565.

INTERSTATE COMMERCE—STATE CONTROL OF ANIMALS FERAE NATURAE.—The Alabama Shrimp Act made it unlawful to transport by water shrimp, taken from the waters of the state, beyond the state boundary, unless the usual price paid at the place to which they were transported was higher than that paid within the state; imposed a tax on shrimp so transported; and prohibited any person, who had not for more than a year been a *bona fide* resident of the state, from catching shrimp for shipment out of the state by water. Gen. Acts, 1919, secs. 8, 12. The plaintiff, who was engaged in the shrimp packing business in Mississippi, brought suit to enjoin the enforcement of this act. *Held,* that these regulations were void as in violation of the commerce clause of the United States Constitution. *Elmer v. Wallace* (1921, N. D. Ala.) 275 Fed. 86.

Shrimp, with fish in general, may properly be classified as animals *ferae naturae. Gratz v. McKee* (1919, C. C. A. 8th) 258 Fed. 335; *State v. Adams* (1920) 142 Ark. 411, 218 S. W. 845. In so far as there can be property in fish in streams, title is in the state with an exclusive power of control. *State v. Blanchard* (1920) 96 Or. 79, 189 Pac. 421; *Gratz v. McKee* (1920, C. C. A. 8th) 270 Fed. 713; *State v. Hume* (1908) 52 Or. 1, 95 Pac. 808; *Commonwealth v. Cosick* (1910) 19 Pa. Dist. R. 309. Even migratory fish in interstate navigable streams or in coast waters are subject to exclusive state regulation while within the state boundaries. Gould, *Waters* (3d ed. 1900) par. 38; *State v. McCullagh* (1915) 96 Kan. 786, 153 Pac. 557. Although the fish, after being caught, are to be transported beyond state limits, Congress may not, under the guise of interstate commerce, regulate the catching of them. *Geer v. Connecticut* (1895) 161 U. S. 519, 16 Sup. Ct. 600. Such legislation is within the proper police power of the state, although it results in harm to the fishing industry in neighboring states. *Union Packing Co. v. Shoemaker* (1921) 98 Or. 659, 194 Pac. 854. Nor is this power of control terminated by the capture and reduction to possession of an animal *ferae naturae.* The state may follow wild game into the hands of an individual so as to prohibit its coming under federal interstate commerce regulation. *United States v. McCullagh* (1915, D. C. Kan.) 221 Fed. 288. It is to be noticed in all of these cases, where statutes similar to the instant act have been upheld, that their primary purpose was to preserve wild game for the benefit of the citizens of the state. But when the statute has no protective purposes, either as to animals or citizens, and is designed to discriminate against the industries of neighboring states by preventing shipments out of the state except on arbitrary conditions as to price, etc., the police power seems to have been abused at the expense of federal control over interstate commerce. Cf. *State v. Savage* (1919) 96 Or. 53, 184 Pac. 567.

MANDAMUS—WHEN ISSUABLE—DISCRETION OF CITY COUNCIL.—Under New York statutes a bus owner is required to obtain the consent of the local authorities as well as that of the State Public Service Commission before he is privileged to operate. Laws, 1915, ch. 667; 1919, ch. 307. The city council of Newburgh, after a hearing, denied such consent to the relator upon the grounds that his bus line was not a public necessity or for the best interest of the city, whereupon an action was brought to compel the city council by mandamus to grant such consent. *Held,* that the writ should be granted. *People, ex rel. Aber, v. Leonard* (1921, N. Y. Sup. Ct.) 116 Misc. 591.

That city councils are amenable to the writ of mandamus as are others upon whom public duties are imposed is unquestionable. *State v. Mayor and Council of Madison* (1919) 170 Wis. 133, 174 N. W. 471; *Harman v. City of Parsons*

(1917) 81 W. Va. 197, 94 S. E. 135; *Huey v. Waldrop* (1904) 141 Ala. 318, 37 So. 380. But it is well settled that the mandamus is not a proper remedy for the enforcement of duties which involve the exercise of discretion or to control such discretion, unless it has been abused. *Cruise & Smiley Co. v. Town Council of Lincoln* (1920) 42 R. I. 408, 108 Atl. 419; *McIntyre v. Murphy* (1919) 177 N. C. 300, 98 S. E. 820; *People v. State Racing Com.* (1907) 190 N. Y. 31, 82 N. E. 723. The writ has been issued to set the exercise of discretion in motion. *State v. Board of Comrs.* (1913) 180 Ala. 489, 61 So. 368; *Richmond County v. Steed* (1920) 150 Ga. 229, 103 S. E. 253. When, however, the discretion has been honestly and not capriciously or arbitrarily exercised, it is conclusive. *Robinson v. Otis* (1916) 30 Calif. App. 769, 159 Pac. 441; *Pearl River Bank v. Town of Picayune* (1921, Miss.) 89 So. 9. The granting of licenses for the conduct of particular businesses or occupations is usually regarded as a discretionary power and thus not enforceable by mandamus. High, *Extraordinary Legal Remedies* (3d ed. 1896) ch. 5, sec. 327; *Armstrong v. Murphy* (1901) 65 App. Div. 123, 72 N. Y. Supp. 473. But its issuance may be made mandatory by statute. *State v. City of Grafton* (1920, W. Va) 104 S. E. 487; *In re O'Rourke* (1894, Sup. Ct.) 9 Misc. 564, 30 N. Y. Supp. 375. The courts are agreed that the complainant's legal right must be clear to entitle him to the writ of mandamus. 2 Spelling. *Injunctions and Extraordinary Remedies* (2d ed. 1901) ch. 40, sec. 1370; *People v. Board of Education* (1921, Sup. Ct.) 188 N. Y. Supp. 686; *People v. Walker* (1920, Sup. Ct.) 113 Misc. 592, 184 N. Y. Supp. 879. In the instant case it is by no means clear that the city was under any duty to give its consent to the relator's operation of his bus line. It is equally doubtful whether the legislature intended to restrict the powers of regulation and control delegated to local authorities to the limits the opinion suggests. See COMMENTS (1921) 31 YALE LAW JOURNAL, 183. The case seems unsustainable.

NEGLIGENCE—DEGREES OF NEGLIGENCE.—In an action for damages for injuries sustained as a result of the alleged negligent and wanton acts of the defendant, the latter pleaded contributory negligence as a defence. The trial court in instructing the jury failed to distinguish between negligence (whether slight, ordinary, or gross) and wanton acts involving the element of the defendant's knowledge of the plaintiff's danger and a conscious indifference to the consequences of his acts. *Held,* that the instruction was erroneous. *Payne v. Vance* (1921, Ohio) 133 N. E. 85.

In the earlier cases, the courts attempted to divide negligence into three degrees, slight, ordinary, and gross. *Brand v. Schenectady & Troy Ry.* (1850, N. Y.) 8 Barb. 368; *Union Pacific Ry. v. Henry* (1887) 36 Kans. 565, 14 Pac. 1. Where negligence without reference to the degree is the basis of the right to recover, such distinctions can only be a source of confusion. As has well been said, "gross" negligence is nothing more than negligence with a vituperative epithet. *Wilson v. Brett* (1843, Exch.) 11 M. & W. 113, 116. The modern American cases have shown a strong tendency to reject the doctrine that negligence is capable of division into degrees, and hold in effect that although the *amount* of care to be exercised varies with the circumstances, the *degree* remains the same, namely, appropriate care under the circumstances. *Milwaukee etc. Ry. v. Arms* (1875) 91 U. S. 489; *Young v. St. Louis etc. Ry.* (1910) 227 Mo. 307, 127 S. W. 19; *Denny v. Chicago etc. Ry.* (1911) 150 Iowa, 460, 130 N. W. 363. It is essential, however, to distinguish negligence from reckless or wanton conduct, for in cases involving the latter, contributory negligence is no defence and punitive damages may be awarded. *Crosman v. Southern Pac. Co.* (1921, Nev.) 194 Pac. 839; *Pullman Co. v. Pulliam* (1920) 187 Ky. 213, 218 S. W. 1005. One is guilty of reckless or wanton conduct if he exhibits an entire absence of care for life,

person, or property of others and displays an indifference to disastrous consequences. *Lund v. Osborne* (1917) 200 Ill. App. 457. Statutes, by using the term "gross negligence," have made it incumbent upon some courts to define its meaning. In Massachusetts it is held that it means a materially greater want of care than in case of ordinary negligence but yet less than the willful, wanton, or reckless conduct which makes a defendant liable to a trespasser. *Massaletti v. Fitzroy* (1917) 228 Mass. 487, 118 N. E. 168. In absence of statute, however, the amount of negligence is important only in cases of wanton or reckless conduct. The court in the instant case, in repudiating the doctrine of the divisibility of negligence into degrees, is in accord with the modern tendency.

NEGLIGENCE—RECOVERY FOR DEATH OF CHILD CAUSED BY EATING POISONOUS BERRIES IN A PUBLIC PARK.—The plaintiff's child, a boy of seven, died from eating a few berries which he picked from a shrub growing in a part of the public Botanic Gardens of Glasgow, in which he and other children were accustomed to play. Although highly poisonous the berries were luscious and alluring in appearance, bearing great similarity to currants. The plaintiff sued the defendant city for negligence. *Held,* that a cause of action was disclosed and the case should have been allowed to go to the jury. *Glasgow Corporation v. Taylor* (1921, H. L.) 38 T. L. R. 102.

As a result of loose and inaccurate application of the expression "attractive nuisance" much obscurity has been cast upon the duties of landowners in respect to children. The question presented is whether an infant, even though a trespasser, is entitled to have the place into which it may stray and the things it finds there made so safe, with reference to its own incapacity to take care of itself, as to render it immune from injury. If a categorical answer to any question of law were possible, in England it would be, *no*. The owner of land owes no duty to make premises safe for a trespasser, whether infant or adult, and in the absence of the concurrence of a license and either negligence or some element of fraud, there could be no recovery by a child for injuries received. *Hardy v. Central London Ry.* [1920] 3 K. B. 459; *Latham v. R. Johnson & Nephew, Ltd.* [1913] 1 K. B. 398; *Cooke v. Midland Great Western Ry.* [1909, H. L.] A. C. 229. In the United States the authorities are in an almost hopeless state of inconsistency. A few jurisdictions have adhered strictly to the orthodox rule as to the duty to trespassers and have refused to extend the doctrine beyond the so-called "turn-table" situation. *Blough v. Chicago Great Western Ry.* (1920, Iowa) 179 N. W. 840; see (1921) 20 MICH. L. REV. 450. Other jurisdictions have seized upon the doctrine with avidity and have applied it to almost every conceivable state of facts. *Comer v. City of Winston-Salem* (1919, N. C.) 100 S. E. 619 (child crawling between bridge railing to see rushing waters); *N. Y. N. H. & H. Ry. v. Fruchter* (1921, C. C. A. 2d.) 271 Fed. 419 (where a boy received a shock who climbed the topmost girder of a bridge and reached for a pigeon resting on a live wire), criticised in (1921) 30 YALE LAW JOURNAL, 870. It is readily apparent that many courts have allowed their sympathy for the infant plaintiff to affect their judgment. The conclusion reached in some of the cases is untenable. It is practically impossible to render premises "child-proof" and yet the courts in effect impose that burden upon the landowner. The Lords in the instant case base their decision flatly on the ground of negligence by the defendants in view of all the circumstances. The poisonous berries were exposed to the children who were privileged to be where they were, and the age of the child precluded negligence on his part. See (1921) 31 YALE LAW JOURNAL, 102; Bohlen, *The Duty of a Landlord to Those Entering his Premises* (1921) 69 U. PA. L. REV. 237, 340.

SALES—IMPLIED WARRANTY—FITNESS FOR RESALE UNDER LAW OF FOREIGN COUNTRY.—The plaintiff, an Argentine firm, purchased a quantity of medicinal waters from the defendant, an English manufacturer, who had been supplying the plaintiffs with these waters for a number of years. The Argentine authorities analyzed some of the waters of the last purchase, and ordered them to be destroyed because they were found to contain salicylic acid and were not legally salable in Argentina. The plaintiff instituted suit for damages for breach of warranty alleged to be implied by section 14 of the English Sale of Goods Act. (1893) 56 & 57 Vict. c 71, sec. 14. *Held,* that there was no implied warranty that the waters were suitable for sale in Argentina, and that the words "merchantable quality" in the English statute had no reference to the state of law of the country to which the goods were to be sent. *Sumner, Permain & Co. Ltd. v. J. G. Webb & Co. Ltd.* (1921, C. A.) 38 T. L. R. 45.

Caveat emptor governed the sale of goods at early common law, and in the absence of an express warranty, the vendor was not liable for any defects in the article sold unless he was aware of them. Rolle, *Abridgement,* p. 90, pl. 1, 2, 3, 4. However, it is now well established that under certain circumstances a seller impliedly warrants the merchantability of the articles sold, and if their intended use is communicated to him there is an implied warranty that the goods are reasonably suited for that use. *Jones v. Just* (1868) L. R. 3 Q. B. 197; *Brown v. Edgington* (1841, C. P.) 2 Man. & G. 279; *Murchie v. Cornell* (1891) 155 Mass. 60, 29 N. E. 207. It must appear that the buyer relied on the judgment and skill of the seller in the selection of the article before any warranty of fitness can be implied. *Kellogg Bridge Co. v. Hamilton* (1884) 110 U. S. 108, 3 Sup. Ct. 537. This rule has been incorporated in both the English Sale of Goods Act, section 14, and in the American Uniform Sales Act, section 15. Apparently the burden is on the buyer, who alleges the warranty, to prove that he relied on the seller's superior knowledge. It is possible in certain cases that describing the goods as being of merchantable quality is equivalent to saying that they are fit for the use intended. See Williston, *Sales* (1909) sec. 235. This would be the situation in the instant case if the contentions of the plaintiff were upheld; if the tonic waters were not fit for resale in Argentina they were not of "merchantable quality." It seems that this term has been used solely to describe the physical state of the goods sold, i. e. that they are sound commodities, and are not damaged or in a state of decay such as would prevent them from being readily salable. See Benjamin, *Sales* (1920) 6th ed. 730; 2 Mechem, *Sales* (1901) sec. 1340. It is conceivable, however, that an English manufacturer could be held to have impliedly warranted his products to be legally salable under the law of England, but this warranty could hardly be implied with reference to the law of a foreign country of which the manufacturer has no knowledge. Cf. *National Metal Edge Box Co. v. Gotham* (1908) 125 App. Div. 101, 109 N. Y. Supp. 450. In the absence of any proof that the plaintiff relied on the superior knowledge and judgment of the defendant the court seems fully justified in having decided in the latter's favor.

TAXATION—INTANGIBLE PERSONAL PROPERTY OF RESIDENT SITUATED IN ANOTHER STATE AND BEQUEATHED TO NON-RESIDENT.—A resident of Colorado died in New York, leaving personal property consisting of stocks, bonds, and credits, all of which were in New York. The legatees were residents of New York and the will was probated in that state. The State of Colorado brought suit in a New York court against the executrix and legatees to recover an inheritance tax. *Held,* that the action could not be maintained. *State of Colorado v. Harbeck* (1921, N. Y.) 133 N. E. 357.

Intangible personal property, although outside the state where the decedent

was a resident, may be subjected to an inheritance tax under the application of the maxim *"mobilia sequuntur personam."* *Bullen v. Wisconsin* (1915) 240 U. S. 625, 36 Sup. Ct. 473; *Frothingham v. Shaw* (1899) 175 Mass. 59, 55 N. E. 623. Cf. *Anderson v. Durr* (1921, U. S.) 42 Sup. Ct. 15; COMMENTS (1922) 31 YALE LAW JOURNAL, 429. And vice versa, where the property has a situs within the state, an inheritance tax may be imposed irrespective of where the decedent or the beneficiary may reside. *Blackstone v. Miller* (1903) 188 U. S. 189, 23 Sup. Ct. 277; *Carr v. Edwards* (1913) 84 N. J. L. 667, 87 Atl. 132. On this latter principle, shares of stock in a domestic corporation may be subjected to a transfer tax although the decedent and beneficiary are non-residents, and the certificates of stock are outside the state. *Greves v. Shaw* (1899) 173 Mass. 205, 53 N. E. 372; *People v. Griffith* (1910) 245 Ill. 532, 92 N. E. 313. It has been held in Illinois, however, that shares of stock in a foreign corporation are not subject to such a tax although the corporation owned property within the state, the conditions being otherwise similar. *Oakman v. Small* (1918) 282 Ill. 360, 118 N. E. 775. The real reason for this doctrine is probably the practical objection to enforcing such a tax by taking the corporate property. See Gleason & Otis, *Inheritance Taxation* (2d. ed. 1919) 321. The reason given by the court, however, was the familiar principle that the taxing power of a state is limited to persons or property within its jurisdiction, which seems inapplicable to the facts of the case since there was property of the corporation in the state, of which the share-holders are of course the owners. But in the instant case an even greater practical difficulty existed, in that there was actually no property in Colorado and hence no way to collect the tax by a proceeding in that state, the beneficiaries being also beyond the jurisdiction. *Pennoyer v. Neff* (1877) 95 U. S. 714. The New York Court, furthermore, was clearly right in dismissing the suit brought by the State of Colorado against the executrix and beneficiaries in New York, since the penal and revenue laws of one state have no force in another. *Wisconsin v. Pelican Insurance Company* (1888) 127 U. S. 265, 8 Sup. Ct. 1370. The present case does not decide whether the tax failed because there was no taxing power or because there was no means of collecting it. It has been held that a state has no constitutional power to impose a transfer tax merely because the beneficiary lives within the state, if the decedent is a non-resident and the property is also outside the state. *State v. Brim* (1858) 57 N. C. 300. This is clearly sound if the tax is upon the privilege of transmitting rather than upon the privilege of receiving. See (1920) 30 YALE LAW JOURNAL, 199; but cf. *Carter's Estate* (1918) 167 Wis. 89, 166 N. W. 657 (evenly divided court); see also *People v. Griffith, supra.* So far as the *power* to tax is involved it appears therefore that the residence of the decedent and not that of the beneficiary is important. (But cf. *Oakman v. Small, supra,* in which the court said that either the beneficiary or the property must be within the jurisdiction.) Hence if the beneficiaries, though resident in New York, could be served with process in Colorado the present tax might be collected. In other words the tax failed for lack of "jurisdiction *in personam*" rather than for lack of "jurisdiction of the subject matter." *People v. Union Trust Co.* (1912) 255 Ill. 168, 99 N. E. 377; *Re Hodges* (1915) 170 Calif. 492, 150 Pac. 344; *Re Dingman* (1901) 66 App. Div. 228, 72 N. Y. Supp. 694. The State of Colorado thus imposed a legitimate tax, for the collection of which, however, under the peculiar circumstances, no adequate machinery can be devised.

TORTS—CONVERSION—DEFENDANT LIABLE FOR A MISDELIVERY RESULTING IN LOSS.—The defendants agreed to buy a certain bond from the plaintiff. By mistake the plaintiffs sent a different bond, which their messenger dropped

through a slot maintained in the defendant's office for the receipt of securities. The defendants immediately discovered the error and, in endeavoring to return the bond to the plaintiff's messenger, handed it out through the window to a stranger, thinking that he was the plaintiff's messenger. The stranger having disappeared with the bond, the plaintiff sued the defendants for conversion. *Held,* that the plaintiff could recover. Lehman, J., *dissenting. Cohen v. Pressprich* (1922, N. Y. Sup. Ct. App. T.) 66 N. Y. L. JOUR. 98 (Jan. 30, 1922).

Conversion being a tort of absolute liability, the responsibility of the defendant is not affected by the fact that he acted in good faith or exercised due care. Pollock, *Torts* (11th ed. 1920) 381; Bowers, *Conversion* (1917) sec. 4. An innocent mistake is no defence. *White v. Yawkey* (1896) 108 Ala. 270, 19 So. 360; *Edwards v. Express Co.* (1903) 121 Iowa, 744, 96 N. W. 740. It is sufficient if the defendant does an act which deprives another of his property permanently or for an indefinite period of time. *Knapp v. Guyer* (1909) 75 N. H. 397, 74 Atl. 873; *Hiort v. Bott* (1874) L. R. 9 Exch. 86; Salmond, *Torts* (5th ed. 1920) 348. A carrier who, through mistake, misdelivers goods is liable for conversion. *Youl v. Harbottle* [1791, N. P.] 1 Peake, 49; *Furman v. Union Pacific Ry.* (1887) 106 N. Y. 579, 13 N. E. 587. The problem presented in the principal case is difficult because the court is called upon to decide which of two innocent persons must suffer. While it appears from the conclusion of the majority opinion that the court was not fully convinced by their own argument, it is believed that the decision is sound. There seems to be no difference in principle between the instant case and the *Hiort* and *Knapp* cases, *supra.* In each of them, the loss was due to the defendant's innocent delivery of the plaintiff's goods to a person who was unauthorized to receive them. It is said that "Any one who finding himself in possession of goods hands them over to another takes on himself the risk that such person may have no right to receive them." Clerk & Lindsell, *Torts* (7th ed. 1921) 238. If this is acceptable as a correct statement of the law, clearly the defendants must bear the loss. It may be doubtful whether they had possession of the bond as soon as it was dropped through the slot provided for the receipt of such papers, but they certainly assumed to control it for an instant before handing it to the stranger.

TRUSTS—VARYING INVESTMENTS AGAINST EXPRESS DIRECTION.—The testator, owner of a business for the cooperage of whiskey barrels, devised the entire estate to his wife as trustee during her life or widowhood, to carry on the business so "that the family will continue to live as nearly as during my life as possible." Because of national prohibition the business became unprofitable. *Held,* that the trustee could, with permission of the court, convert the trust property into other investments in order to carry out the purpose of the trust. *Stout v. Stout* (1921, Ky.) 233 S. W. 1057.

Generally the courts adhere to the rule that a trust instrument is the sole source of all the powers of a trustee. *Drake v. Crane* (1895) 127 Mo. 85, 29 S. W. 990; *Worcester City Missionary Soc. v. Memorial Church* (1904) 186 Mass. 531, 72 N. E. 71. So when specific designation is made by the testator for the investment of the trust estate, it is generally held that the trustee is bound by the directions. *Merchants Loan & Trust Co. v. Northern Trust Co.* (1911) 250 Ill. 86, 95 N. E. 59; *Matter of London* (1918, Surro.) 104 Misc. 372, 171 N. Y. Supp. 981; 1 Perry, *Trusts* (6th ed. 1911) sec. 452. A court of equity can make no new will for the testator. *Drake v. Crane, supra.* However, exceptions to this ancient rule were early recognized. Thus when circumstances arose necessitating acts not literally within the terms of the trust, equity, by constructing what it presumed would have been the testator's intent, gave additional powers to the trustee. *Revel v. Watkinson* (1748, Ch.) 1 Ves. Sen. 93 (mainte-

nance, where otherwise unprovided for, allowed out of corpus); *Packard v. Illinois Trust & Savings Bank* (1914) 261 Ill. 450, 104 N. E. 275. A clear departure from directions was made in the case of a devise of personalty to be enjoyed by persons in succession, where, if the property was wasting or of a perishable nature, it became the duty of the trustee, with the approval of the court, to convert the property into permanent securities. *Howe v. Earl of Dartmouth* (1802, Ch.) 7 Ves. Jr. 137. It is well settled that the trustee may vary the investment or terminate the trust in the teeth of the testator's expressed intent, with the consent of all the *cestuis* when they are of full age and sound mind. *Dodge v. Dodge* (1914) 112 Me. 291, 92 Atl. 49; see *White v. Sherman* (1897) 168 Ill. 589, 48 N. E. 128. The primary object of the trust is to preserve the fund and to secure a proper income therefrom, or, in other words, the purpose of the trust overrides the directions of the testator for the investment. *Ogden v. Allen* (1917) 225 Mass. 595, 114 N. E. 862; *Johns v. Montgomery* (1914) 265 Ill. 21, 106 N. E. 497. Specific directions are given to guarantee the success of the trust. The testator cannot foresee every circumstance which would threaten his purpose, and specific directions should not be made a fetish where their object can only be accomplished by the assistance of equity in authorizing an express departure from the trust instrument. A differentiation is thus made between the end and the means. *Matter of London, supra; In re Head* (1919) 88 L. J. Ch. 236 (statute authorizing investment in war loan "notwithstanding anything in instrument creating the trust" (1917) 7 & 8 Geo. V, c. 31, sec. 35). A trustee takes the risk of loss in departing from the express directions of a testator without the prior authorization of equity which will be granted only with reluctance. *Vickers v. Vickers* (1920) 189 Ky. 323, 225 S. W. 44. The court, in the instant case, faced with an uncontemplated situation reached what appears to have been the sensible result.